



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-5000

OFFICE OF PUBLIC AND INDIAN HOUSING

Special Attention of

Notice PIH 2017-24 (HA)

Public Housing Agencies (PHAs)
Public Housing Office Directors
Public Housing Program Center Directors
Field Office Directors
Resident Management Corporations

Issued: November 29, 2017

This notice remains in effect until amended,
or superseded

Cross References: 24 CFR part 970, Consolidated Annual Contributions Contract (HUD 53012A and B)

SUBJECT: Guidance on Third-Party Agreements Encumbering Public Housing Property

1. **Background.** For purposes of this notice, a third-party agreement means an agreement (other than a dwelling lease) between a PHA and a third-party that encumbers a PHA's use or interest in public housing property. Third-party agreements may take various forms including but not limited to leases, licenses, leaseholds, rights-of-ways, easements, operating agreements, contracts, liens, assignments, and asset transfers.

HUD provides responsibility and flexibility to PHAs regarding third-party agreements. HUD encourages PHAs to employ innovative approaches to achieve optimal program operations and revenue. However, HUD needs to balance PHA flexibility with public operational and financial stability. HUD is concerned with any third-party agreement that interferes with the use of the public housing property or puts the PHA's finances at risk.

In accordance with the U.S. Housing Act of 1937 (1937 Act) and section 7 of the Consolidated Annual Contributions Contract (ACC), PHAs are prohibited from disposing or encumbering public housing property without prior written approval from HUD, except for dwelling leases with eligible families for units covered by the ACC and normal uses associated with the operation of the project.

Section 18 of the 1937 Act governs the demolition and disposition of public housing property. Disposition means the conveyance or other transfer by the PHA, by sale or other transaction, of any interest in the real estate of a public housing project (see 24 CFR 970.5) and subject to the exceptions stated in 24 CFR 970.3. These exceptions are:

- A. Leasing of dwelling or non-dwelling space incidental to the normal operation of the project for public housing purposes. 24 CFR 970.3(b)(4).
- B. Easements, rights-of-ways, and transfers of utility systems incidental to the normal operation of the public housing. 24 CFR 970.3(b)(7).
- C. Units or land leased for non-dwelling purposes for one year or less. 24 CFR 970.3(b)(10).

For purposes of this notice, public housing or public housing property means low-income housing, and all necessary appurtenances thereto, assisted under the 1937 Act, other than assistance under 42 U.S.C. 1437f of the 1937 Act (section 8) and includes public housing units developed pursuant to the mixed-finance development method. When used in reference to public housing, the term "project" is defined by section 3(b)(1) of the 1937 Act and means housing developed, acquired, or assisted by a PHA under the 1937 Act, and the improvements of any such housing. Public housing includes non-dwelling property (e.g., vacant land, administrative buildings, community buildings) that was acquired, developed, modernized, operated or maintained with 1937 Act funds. A valid Declaration

of Trust or Declaration of Restrictive Covenants (DOT/DORC) must be recorded against public housing real property.

2. **Types of Third-Party Agreements.** Third-party agreements generally fall into two basic categories:
 - A. **Agreements for normal uses associated with the operation of public housing.** Pursuant to the ACC and 24 CFR 970.3(b)(4) and (b)(7), PHAs may enter into these agreements without HUD approval. Examples of normal uses include agreements related to: standard resident amenities (e.g., laundry rooms), resident supportive services, police sub-stations (to the extent they are necessary for crime prevention or to serve public housing residents), utilities and cable service. Telecommunication towers or satellite dishes are not within the normal operation of the project for public housing purposes (see below).
 - B. **Agreements unrelated to normal uses associated with the operation of public housing.** Agreements to generate revenue or offer civic/community engagements are frequently proposed, either on non-dwelling public housing property (e.g., vacant land or non-dwelling buildings) or that impact public housing units. Examples include: telecommunication and cell tower agreements, solar panel agreements, leases for parking lots, seasonal leases to local merchants to sell holiday trees, agreements for the installation of billboards, and dedication of public housing property for use as streets, alleys, or other public rights-of-ways.
3. **Required HUD Approvals.** PHAs are responsible for determining if a third-party agreement is subject to HUD review and, if so, whether such review must be done by HUD’s Special Applications Center (SAC) under 24 CFR part 970 or the local HUD Office of Public Housing (Field Office). PHAs analyze the following in making this determination:
 - A. **Disposition Analysis.** Is the agreement a disposition as defined by 24 CFR 970.5? That is, does the agreement convey or otherwise transfer any interest in real estate of the public housing and does not fall into one of the exceptions in 970.3(b)¹? If yes, then SAC approval is required, which in turn, includes a review by HUD’s Office of Fair Housing and Equal Opportunity (FHEO) for civil rights compliance. If no, then SAC approval is not required (but Field Office approval may be required). If SAC approval is not required, the PHA needs to perform the ACC analysis below.
 - B. **ACC Analysis.** Does the agreement fall into an exception stated in section 7 of the ACC? Specifically, is the agreement for “normal uses associated with the operation of the project(s)”²? If yes, HUD approval is generally not required and the PHA may enter into the agreement.² If no, Field Office approval is required.
4. **SAC Approval.** If a PHA determines SAC approval is required, the PHA must submit a disposition application for the third-party agreement through the Inventory Removals Submodule of the IMS/PIC system. The PHA attaches the proposed, non-executed third-party agreement. SAC reviews the application for compliance with 24 CFR part 970 (e.g., board resolution, PHA plan, local government

¹ Note that a lease of “one year or less” does not fall into the 970.3(b)(10) exemption if it automatically renews for a greater term. The PHA must have a genuine choice about renewing the lease. The terms of the lease must not contemplate an extension or automatic renewal of a longer term. For instance, if a PHA is locked into a 5-year arrangement, then the lease does not fall into the 970.3(b)(10) exception.

² Note that if the agreement is for “[t]he leasing of dwelling or non-dwelling space incidental to the normal operation of the project for public housing purposes, as permitted by the ACC,” or is for an “easement, right-of-way, or transfer of utility systems incidental to the normal operation of the project for public housing purposes, as permitted by the ACC” pursuant to 24 CFR 970.3(b)(4), then HUD approval is not required. Similarly, if the agreement is for an “easement, right-of-way, or transfer of utility systems incidental to the normal operation of the project for public housing purposes, as permitted by the ACC” pursuant to 24 CFR 970.3(b)(7), then HUD approval is not required. The only exception to this is if the agreement or a memorandum of agreement is recorded against the property. In this case, Field Office approval is required even if the agreement is for normal public housing uses.

consultation, resident consultation, environmental reviews, appraisal or other valuation of the third-party agreement/property interest, civil rights certification, and use of proceeds). FHEO reviews the application to ensure compliance with fair housing and civil rights certifications. As part of its review, SAC requests Field Office review in accordance with this notice, state law, the ACC and other public housing requirements. If all disposition and related civil rights requirements are met and the Field Office approves the proposed form of agreement, SAC issues an approval.

5. **Field Office Approval.** If a PHA determines Field Office approval is required, the PHA provides the Field Office with an explanation of its intent to enter into the agreement, a copy of the proposed, non-executed agreement, a copy of what the PHA intends to record against the property (if anything), and any time-frames or deadlines. The Field Office may request additional information from the PHA (e.g., environmental clearance in accordance with PIH Notice 2016-22) and consult its Field Counsel, as appropriate. The Field Office reviews the agreement in accordance with the requirements of this notice, state law, the ACC, and other HUD requirements. If all requirements are met, the Field Office issues an approval.
6. **Requirements for Third-Party Agreements.** Regardless of the required HUD approvals (if any), before entering into a third-party agreement, PHAs must ensure consistency with public housing requirements in compliance with the following:
 - A. Subordination. The agreement is in a subordinate position to the ACC and DOT/DORC.
 - B. Conflict Clause. The agreement does not impose on a PHA any duty, obligation, or requirement which conflicts with statutes, regulations, ACC and other HUD requirements.
 - C. No PHA Indemnification of Third-Party. The PHA does not indemnify or agree to provide guarantees or pledges with public housing property (unless approved by HUD).
 - D. No HUD Guarantor of PHA. HUD is not guarantor of the PHA or liable for PHA actions.
 - E. Termination. The PHA can terminate the agreement if HUD approves the termination of the ACC at the project, under Section 18 of the 1937 Act or the Rental Assistance Demonstration (RAD) program, or if HUD determines the agreement does not comply with public housing requirements, including, but not limited to, disposition requirements under 24 CFR part 970.
 - F. Reasonable Use and No Adverse Impact. The use of the space is reasonable and does not adversely impact the operation of the project as public housing, including the impact on residents (health and safety) and the impact on the physical property (structural integrity).
 - G. PHA control. The agreement may not allow the third-party to make unilateral actions (e.g., adding equipment) or have exclusive or excessive access that may that may jeopardize the PHA's control of the property.
 - H. Prohibited Assignments. The agreement does not include assignment rights or rights of mortgage or security interests without HUD approval under section 30 of the 1937 Act.
 - I. Civil Rights Compliance. The agreement will not violate any remedial civil rights agreement or order and is consistent with court or administrative agency-ordered requirements or requirements in a settlement agreement.

See Appendix A of this notice for suggested language for inclusion in agreements.

7. **Additional Provisions for Third-Party Agreements not subject to SAC review.** The following apply to third-party agreements that are not reviewed by the SAC:
 - A. Environmental Clearance. PHAs must comply with PIH Notice 2016-22. The scope of an environmental review includes any related activities arising from the agreement. An agreement may be covered by a 24 CFR part 50 or 58 programmatic exemption. If an environmental review is required, it must be completed before the parties enter into the agreement, even if that agreement is not subject to SAC review, pursuant to 24 CFR 58.22(a) which prohibits choice-limiting actions.

- B. PHA Plan (Annual Plan). PHAs are generally required to include third-party agreements in their PHA Plans or Significant Amendments to their PHA Plans, based on PHA requirements at 24 CFR part 903. For instance, PHAs are required to include third-party agreements for social services in their PHA Plan. Similarly, PHAs are required to include third-party agreements that generate non-rental income in their PHA Plan as a discussion of financial resources and planned uses of those resources. See 24 CFR part 903.7(c).
 - C. Procurement Requirements. PHAs must comply with applicable procurement requirements of 2 CFR part 200 (including competition, hiring, and termination for convenience).
 - D. Non-Rental Income. Revenue generated from a third-party agreement is subject to section 9(k) of the 1937 Act, non-rental income, and the requirements of 2 CFR 200.80 and 2 CFR 200.307.
 - E. Board Approval. Unless for the normal operation of the project as public housing, third-party agreements must be approved by the PHA's board of commissioners.
 - F. Consultation with Residents. Unless for the normal operations of the project as public housing, PHAs must consult with residents who will be impacted by an agreement (e.g., cell tower on a dwelling building).
8. **HUD Monitoring and Oversight.** Third-party agreements are subject to HUD monitoring and oversight. PHAs are responsible for ensuring third-party agreements that they enter into are consistent with public housing requirements.
9. **Technical Assistance.** PHAs may request technical assistance about this notice from SACTA@hud.gov or from their Field Office.

_____/s/_____
Dominique Blom
General Deputy Assistant Secretary
for Public and Indian Housing

Appendix A

Suggested HUD Rider to Third-Party Agreements

(Note the use of this rider does not mean the terms of the third-party agreement complies with this notice. That is, use of the rider does not provide any kind of “safe harbor” or guaranteed HUD approval).

1. **Conflict Clause.** To the extent that any of the foregoing is in conflict with the requirements of the United States Housing Act of 1937 (1937 Act), as amended, federal regulations, and the Annual Contributions Contract (“ACC”), as amended, and other HUD requirements, the HUD requirements shall control and govern in such instances of conflict.
2. **Indemnification Clause.** It is acknowledged and agreed that the PHA (Site Owner) has no authority to provide guarantees, indemnifications, rights of set off, or other pledges involving the assets of any Public Housing Project (as the term ‘Project’ is defined in the ACC between PHA and HUD (the “Public Housing Project”) or other assets of the PHA, including and Housing Choice Voucher (HCV) related assets of the PHA. Accordingly, except as approved by HUD in writing, it is acknowledged that there is no legal right of recourse against: (1) any Public Housing Project of PHA; (2) any operating receipts (as the term “operating receipts” is defined in ACC), HCV receipts or Capital or Operating Funds of PHA; (3) any public housing operating reserve of PHA reflected PHA’s annual operating budget and required under the ACC, or (4) any other asset of the PHA related to the 1937 Act. Should any assets of the PHA be identified at a later date as meeting the criteria set forth above, any guarantees, indemnifications, right of set off, or other pledges involving those assets will be deemed null, void, and unenforceable.
3. **Termination Clause.** If HUD approves the termination of the ACC at the public housing project and/or release of the DOT/DORC (e.g., through a disposition under Section 18 of the 1937 Act, the Rental Assistance Demonstration (RAD) program or any other removal action of the SAC), the PHA may terminate this agreement. In addition, if HUD determines that the agreement does not comply with federal public housing requirements, the PHA may terminate the agreement.
4. **HUD is not a Guarantor.** HUD is not a Guarantor of the PHA and is not liable for the actions of the PHA under this agreement.
5. **No Assignment Rights or Rights of Mortgage or Security Interests.** The agreement does not include any assignment rights or rights of mortgage or security interests unless HUD approval under section 30 of the 1937 Act has been obtained.

Appendix B

Optional Worksheet for PHAs to complete for determining applicable HUD Approvals

(Note the use of this worksheet does not mean the terms of the third-party agreement comply with this notice. PHAs may retain this worksheet in their files to substantiate their determinations.)

Part 1: Disposition Analysis	
<p>Is the agreement a conveyance or other transfer, by sale or other transaction, of any interest in the real estate of a public housing project (see 24 CFR 970.5)?</p>	<p><input type="checkbox"/> Yes - Go on to Question 2 below.</p> <p><input type="checkbox"/> No - Go to Part 2 (ACC Analysis).</p>
<p>Is the agreement for one of the following?</p> <ul style="list-style-type: none"> • Leasing of dwelling or non-dwelling space incidental to the normal operation of the project for public housing purposes, as permitted by the ACC. 24 CFR 970.3(b)(4). • Easements, rights-of-ways, and transfers of utility systems incidental to the normal operation of the development for public housing purposes, as permitted by the ACC. 24 CFR 970.3(b)(7). • Units or land leased for non-dwelling purposes for one year or less. 24 CFR 970.3(b)(10). 	<p><input type="checkbox"/> Yes - End of Disposition Analysis. Go to Part 2 (ACC Analysis).</p> <p><input type="checkbox"/> No - End of Analysis. SAC Approval required.</p>
Part 2: ACC Analysis	
<p>Is the agreement fully within the normal operations and uses of public housing?</p>	<p><input type="checkbox"/> Yes - Go on to Question 2 below.</p> <p><input type="checkbox"/> No - End of Analysis. HUD Field Office Approval required.</p>
<p>Will the agreement or memorandum of agreement be recorded against the property?</p>	<p><input type="checkbox"/> Yes - End of Analysis. HUD Field Office Approval required.</p> <p><input type="checkbox"/> No - End of Analysis. No HUD Approval required.</p>